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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TRACY ANDERSON MIND AND
BODY, LLC, et al.,

Plaintiffs,

v.

MEGAN ROUP, et al.,

Defendants.

CV 22-4735-RSWL-Ex

**ORDER re: MOTION TO
DISMISS AND MOTION TO
STRIKE [15]**

Plaintiffs Tracy Anderson Mind and Body, LLC ("Plaintiff TAMB") and Studio New York LLC ("Plaintiff TANY") (collectively, "Plaintiffs") brought the instant Action against Defendants Megan Roup ("Defendant Roup") and The Sculpt Society ("Defendant TSS") (collectively, "Defendants") alleging copyright infringement, violation of the Lanham Act, breach of contract, and violation of unfair competition law. Currently before the Court is Defendants' Motion to Dismiss [15].

1 Having reviewed all papers submitted pertaining to
2 this Motion, the Court **NOW FINDS AND RULES AS FOLLOWS:**
3 the Court **GRANTS** Defendants' Motion to Dismiss
4 Plaintiffs' Lanham Act and UCL claims **with leave to**
5 **amend** and **DENIES** Defendant's Motion to Dismiss
6 Plaintiffs' copyright and breach of contract claims.

7 I. BACKGROUND

8 A. Factual Background

9 Plaintiffs allege the following in their Complaint:

10 Tracy Anderson ("Anderson") developed the Tracy
11 Anderson Method ("TA Method")—routines combining
12 choreography, fitness, and cardiovascular movement—after
13 decades of research, development, testing, and
14 investment. First Am. Compl. ("FAC") ¶ 1, ECF No. 12.
15 Anderson is the founder and CEO of Plaintiff TAMB, which
16 offers choreography-based fitness and mat movement
17 classes. Id. ¶ 2. In turn, Plaintiff TAMB is the owner
18 of registered copyrights to various media, including
19 DVDs created by and featuring Anderson, that express,
20 relate to, or are based on, the TA Method. Id.

21 In 2011, Plaintiff TANY, a subsidiary under
22 Plaintiff TAMB, which is also owned by Anderson,
23 employed Defendant Roup as a trainer. Id. ¶ 3.
24 Defendant Roup was required to sign a Trainer Agreement
25 upon employment. Id. The Trainer Agreement prohibits
26 trainers from using or disclosing the company's
27 confidential information, which includes "nonpublic
28 business and operation information, training materials

1 and manuals, and transcribed methods . . . including
2 those comprising the TA Method's proprietary
3 choreography movements." Id.

4 During Defendant Roup's six-year employment with
5 Plaintiff TANY, Defendant Roup learned and had access to
6 significant confidential information, including
7 "(i) training materials, choreography transcriptions,
8 and custom write-ups related to the performance and
9 teaching of the TA Method, and (ii) business
10 information, customer lists, and operating procedures."
11 Id. ¶ 4.

12 Later, in or around February 2017, Defendant Roup
13 terminated her employment with Plaintiff TANY and
14 founded Defendant TSS the next month. Id. ¶ 5.
15 Defendant TSS also offers "choreography-based fitness
16 and mat movement classes that directly compete with
17 Plaintiffs[' classes]." Id. In creating and operating
18 Defendant TSS, Defendant Roup neither references her
19 association with Plaintiffs, nor credits Plaintiffs for
20 training, teaching, or developing Defendant Roup. Id. ¶
21 7. Plaintiffs thus filed the current Action seeking
22 damages and injunctive relief for copyright
23 infringement, breach of contract, violation of the
24 Lanham Act, and unfair competition. Id. ¶ 10.

25 **B. Procedural Background**

26 Plaintiffs filed their First Amended Complaint [12]
27 on September 13, 2022. Defendants then filed the
28 instant Motion [15] on September 27, 2022. Plaintiffs

1 opposed [17] the Motion on October 11, 2022, and
2 Defendants replied [18] on October 18, 2022.

3 II. DISCUSSION

4 A. Legal Standard

5 1. Motion to Dismiss

6 Rule 12(b)(6) of the Federal Rules of Civil
7 Procedure allows a party to move for dismissal of one or
8 more claims if the pleading fails to state a claim upon
9 which relief can be granted. A complaint must "contain
10 sufficient factual matter, accepted as true, to state a
11 claim to relief that is plausible on its face."
12 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quotation
13 omitted). Dismissal is warranted for a "lack of a
14 cognizable legal theory or the absence of sufficient
15 facts alleged under a cognizable legal theory."
16 Balistreri v. Pacifica Police Dep't, 902 F.2d 696, 699
17 (9th Cir. 1988) (citation omitted).

18 In ruling on a 12(b)(6) motion, a court may
19 generally consider only allegations contained in the
20 pleadings, exhibits attached to the complaint, and
21 matters properly subject to judicial notice. Swartz v.
22 KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007). A court
23 must presume all factual allegations of the complaint to
24 be true and draw all reasonable inferences in favor of
25 the non-moving party. Klarfeld v. United States, 944
26 F.2d 583, 585 (9th Cir. 1991). The question is not
27 whether the plaintiff will ultimately prevail, but
28 whether the plaintiff is entitled to present evidence to

1 support its claims. Jackson v. Birmingham Bd. of Educ.,
2 544 U.S. 167, 184 (2005) (quoting Scheuer v. Rhodes, 416
3 U.S. 232, 236 (1974)). While a complaint need not
4 contain detailed factual allegations, a plaintiff must
5 provide more than "labels and conclusions" or "a
6 formulaic recitation of the elements of a cause of
7 action." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
8 (2007). However, "a well-pleaded complaint may proceed
9 even if it strikes a savvy judge that actual proof of
10 those facts is improbable, and 'that a recovery is very
11 remote and unlikely.'" Id. at 556 (quoting Scheuer v.
12 Rhodes, 416 U.S. 232, 236 (1974)).

13 2. Motion to Strike

14 California's anti-Strategic Lawsuit Against Public
15 Participation ("anti-SLAPP") statute provides for a
16 special motion to strike state law claims brought
17 "primarily to chill the valid exercise of the
18 constitutional rights of freedom of speech and petition
19 for the redress of grievances." Cal. Civ. Proc. Code
20 § 425.16(a). "A court considering a motion to strike
21 under the anti-SLAPP statute must engage in a two-part
22 inquiry." Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097,
23 1110 (9th Cir. 2003). "First, a defendant must make an
24 initial prima facie showing that the plaintiff's suit
25 arises from an act in furtherance of the defendant's
26 rights of petition or free speech." Id. (internal
27 quotation marks and citation omitted). "Second, once
28 the defendant has made a prima facie showing, the burden

1 shifts to the plaintiff to demonstrate the probability
2 of prevailing on the challenged claims.” Id. (internal
3 quotation marks and citation omitted).

4 **B. Analysis**

5 1. Rule 12(b)(6) Motion

6 a. Copyright Infringement

7 Plaintiffs bring a claim against Defendant for
8 copyright infringement. FAC ¶¶ 50-56. “To establish
9 infringement, two elements must be proven: (1) ownership
10 of a valid copyright, and (2) copying of constituent
11 elements of the work that are original.” Feist
12 Publ’ns., Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S.
13 340, 361 (1991). A copyright registration is “prima
14 facie evidence of the validity of the copyright and the
15 facts stated in the certificate.” 17 U.S.C. § 410(c).
16 While an “accused infringer can rebut [the] presumption
17 of validity” conferred by a copyright registration,
18 “such a presumption is strong in a motion to dismiss
19 since the court must assume all factual allegations are
20 true.” Datastorm Techs., Inc. v. Excalibur Commc’ns,
21 Inc., 888 F. Supp. 112, 115 (N.D. Cal. 1995). To show
22 copying, a plaintiff can rely on circumstantial evidence
23 that the defendant had access to the copyrighted work
24 and that there is substantial similarity between
25 defendant’s work and copyrighted work. Swirsky v.
26 Carey, 376 F.3d 841, 844 (9th Cir. 2004).

27 Here, Plaintiffs adequately pled a prima facie case
28 of copyright infringement. First, Plaintiffs provided a

1 list of copyright registrations for nineteen "Motion
2 Picture[s]" for which Plaintiff TAMB is the sole
3 copyright claimant. FAC, Attachment A, ECF No. 12-1.
4 Next, Plaintiffs alleged that Defendants have published
5 videos that "infringe on [Plaintiff TAMB's] copyrights
6 by copying the choreography movements, sequences, and
7 routines depicted in the [copyrighted works];
8 organizational structure and format of the [copyrighted
9 works]; and aesthetic elements depicted in the
10 [copyrighted works]." FAC ¶ 47. Moreover, Plaintiffs
11 contend that Defendants had access to the copyrighted
12 works through Defendant Roup's employment with
13 Plaintiffs and specify that at least three of Defendant's
14 videos are substantially similar to Plaintiff's
15 copyrighted works.¹ Id. ¶¶ 3-4, 48-49. Therefore,

16 ¹ Under certain circumstances, a court ruling on a motion to
17 dismiss may independently assess whether works are not
18 substantially similar. See Christianson v. West Pub. Co., 149
19 F.2d 202, 203 (9th Cir. 1945) ("There is ample authority for
20 holding that when the copyrighted work and the alleged
21 infringement are both before the court, capable of examination
22 and comparison, non-infringement can be determined on a motion to
23 dismiss."). Here, however, the Court cannot properly examine and
24 compare the works to determine non-infringement. Plaintiffs have
25 provided three examples broadly describing how Defendants'
26 "choreography movement, sequences, and routines are substantially
27 similar" to those depicted in Plaintiffs' copyrighted works. FAC
28 ¶ 48. But Plaintiffs did not submit the referenced videos with
their FAC. See generally FAC. Moreover, Plaintiffs state that
"[b]ecause Defendants' videos are published behind a paywall,"
Plaintiffs are "unable to review and compare every one of
Defendants' videos" with their own, and therefore, "the full
extent of Defendants' infringement . . . cannot be assessed until
Defendants produce the videos to Plaintiffs in discovery." Id.
¶ 49. Consequently, the Court is unable to determine non-
infringement at this stage of litigation.

1 Plaintiffs have pled a prima facie case of copyright
2 infringement. See Wake Up & Ball LLC v. Sony Music Ent.
3 Inc., 119 F. Supp. 3d 944, 952 (D. Ariz. 2015) (finding
4 that plaintiff pled a plausible infringement claim by
5 presenting its copyright registration and alleging that
6 defendants published plaintiff's copyrighted work
7 online).

8 Defendants, however, argue that Plaintiffs have not
9 pled a prima facie case of copyright infringement
10 because "functional exercise movements are not
11 copyrightable." Defs.' Mot. to Dismiss ("Mot.") 7:12-
12 14., ECF No. 15. Plaintiffs counter that (1) whether a
13 copyrighted work qualifies for copyright protection is a
14 factual inquiry not appropriate for determination on a
15 motion to dismiss, and (2) regardless, Plaintiffs'
16 choreographic work is copyrightable. Plfs.' Opp'n
17 ("Opp'n") 5:21-21, 8:6-8. The Court agrees that an
18 inquiry into the copyrightability of Plaintiffs' works
19 is not appropriate at this stage of litigation.

20 As explained, when assessing a motion to dismiss,
21 the Court "must assume all factual allegations [in the
22 Complaint] are true." Datastorm Techs., Inc., 888 F.
23 Supp. at 115. Accordingly, motion to dismiss arguments
24 that copyrighted works do not qualify for copyright
25 protection based on a "detailed factual analysis" of the
26 works are "inappropriate . . . as the Court must accept
27 all material factual allegations as true." Thomson v.
28 HMC Grp., No. CV1303273DMGVBKX, 2014 WL 12589312 at *3

(C.D. Cal. Feb. 18, 2014) (holding that motion to dismiss arguments regarding copyrightability are premature and such arguments should instead be asserted at summary judgment); see also P & P Imports, LLC v. Festival Trading, Inc., No. CV171541DOCJCGX, 2018 WL 5099723 at *6 (C.D. Cal. May 15, 2018) (declining to assess copyrightability of a copyrighted work on a motion to dismiss); E. W. Sounds, Inc. v. Phoenix, No. CV 12-6143 CAS AJWX, 2012 WL 4003047 at *3 (C.D. Cal. Sept. 10, 2012) (same).

In Thomson, the defendant asserted that the copyrighted works did not qualify for copyright protection because they were “functional” designs that amounted to “[mere] ideas and concepts.” Thomson, 2014 WL 12589312 at *3. There, the court held that determining whether the copyrighted works fell into the specified categories would require “a detailed factual analysis” inappropriate for a motion to dismiss. Id. Similarly, here, Defendants contend that Plaintiffs’ copyrighted works are not copyrightable because they are “functional exercise movements” that are ultimately “unprotectable ‘ideas’ or ‘processes.’” Mot. 7:12-24. As in Thomson, determining the protectability of Plaintiffs’ copyrighted works would require the Court to conduct a detailed factual analysis unfit for ruling on a motion to dismiss. Thus, Defendants’ argument fails, and Plaintiffs have met their burden of pleading copyright infringement. See Ashcroft, 556 U.S. 662

1 at 678 (holding that a complaint must contain enough
2 factual sufficiency to be plausible on its face to
3 survive a motion to dismiss for failure to plead a
4 claim); see also Lee v. City of Los Angeles, 250 F.3d
5 668, 688 (9th Cir. 2001) (“[F]actual challenges to a
6 plaintiff’s complaint have no bearing on the legal
7 sufficiency of the allegations under Rule 12(b)(6).”).
8 Accordingly, the Court **DENIES** Defendants’ Motion to
9 Dismiss Plaintiffs’ copyright infringement claim.

10 b. Violation of the Lanham Act - False
11 Advertising

12 To succeed on a Lanham Act claim for false
13 advertising, a plaintiff must establish: (1) a false
14 statement of fact by the defendant in a commercial
15 advertisement about its own or another’s product;
16 (2) the statement actually deceived or has the tendency
17 to deceive a substantial segment of its audience;
18 (3) the deception is material, in that it is likely to
19 influence the purchasing decision; (4) the defendant
20 caused its false statement to enter interstate commerce;
21 and (5) the plaintiff has been or is likely to be
22 injured as a result of the false statement, either by
23 direct diversion of sales from itself to defendant or by
24 a lessening of the goodwill associated with its
25 products. See 15 U.S.C. § 1125.

26 Importantly, district courts in the Ninth Circuit
27 apply a heightened pleading standard for false
28 advertising claims. See, e.g., EcoDisc Tech. AG v. DVD

1 Format/Logo Licensing Corp., 711 F. Supp. 2d 1074, 1085
2 (C.D. Cal. 2010) ("Although the Ninth Circuit has not
3 concluded that Rule 9(b) applies to Lanham Act claims,
4 many district courts have applied this heightened
5 pleading standard to claims that are grounded in fraud,
6 such as misrepresentation claims."). "To satisfy
7 Rule 9(b), Plaintiff must state the time, place, and
8 specific content of the false representations as well as
9 the identities of the parties to the misrepresentation."
10 EcoDisc Tech., 711 F. Supp. 2d at 1085 (citing Schreiber
11 Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393,
12 1401 (9th Cir. 1986)). Plaintiffs must also set forth
13 what is false and misleading about the statement and why
14 it is false. Id. (citing Vess v. Ciba-Geigy Corp. USA,
15 317 F.3d 1097, 1106 (9th Cir.2003)).

16 Plaintiffs alleged all elements of a Lanham Act
17 violation with sufficient particularity, specifically
18 listing the following "false and/or misleading"
19 statements from Defendant Roup's biography on
20 Defendants' website: "I knew that there was something
21 missing from the boutique fitness community, so I
22 combined my passion for dance and love for fitness to
23 create The Sculpt Society. I spent years teaching
24 fitness and developing The Sculpt Society method before
25 launching in 2017." FAC ¶ 58. Plaintiffs assert that
26 these statements "misrepresent the nature,
27 characteristics, and qualities of Defendants' services"
28 because they "imply" that (1) Defendant Roup developed

1 the "TSS Method" over a period of multiple years, when
2 she did not; (2) the "TSS Method" was created through
3 years of science-based research, development, data
4 collection, analysis, and trial and error, when it was
5 not; and (3) the "TSS Method" is significantly different
6 from Plaintiffs' "TA Method," when it is not. Id. ¶ 58,
7 59.

8 Defendants counter that these statements are
9 "facially non-actionable" because, amongst other
10 reasons, (1) they are "classic examples of non-
11 actionable opinions or puffery which are both
12 nonmaterial and unlikely to induce consumer reliance,"
13 and (2) they are non-material because a reasonable
14 consumer would not rely on the statements when making
15 purchasing decisions. Mot. 12:22-17:25.

16 The Court's analysis therefore centers on whether
17 Plaintiff has plausibly alleged a false statement of
18 fact.

19 i. False Statement of Fact

20 "To demonstrate falsity within the meaning of the
21 Lanham Act, a plaintiff may show that the statement was
22 literally false, either on its face or by necessary
23 implication, or that the statement was literally true
24 but likely to mislead or confuse consumers." Southland
25 Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139
26 (9th Cir. 1997). The allegedly false statement must be
27 examined in the full context of the advertising or
28 promotional materials in which the statement was made.

1 Id.

2 Importantly, an advertising statement may be non-
3 actionable if it constitutes "puffery," which is defined
4 as "exaggerated advertising, blustering, and boasting
5 upon which no reasonable buyer would rely." Id. at
6 1145. Puffery includes "statement[s] of fact
7 [in]capable of being proved false," statements that are
8 not "specific and measurable," or statements that
9 otherwise cannot be "reasonably interpreted as a
10 statement of objective fact." Coastal Abstract Serv.,
11 Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 731 (9th
12 Cir. 1999); see also Glen Holly Ent., Inc. v. Tektronix
13 Inc., 343 F.3d 1000, 1015 (9th Cir. 2003) (establishing
14 that "generalized, vague, or unspecific assertions"
15 constitute unactionable puffery); Cook, Perkiss & Liehe,
16 Inc. v. N. Cal. Collection Serv., Inc., 911 F.2d 242,
17 246 (9th Cir. 1990) ("[Puffery] has been described by
18 most courts as involving outrageous generalized
19 statements, not making specific claims, that are so
20 exaggerated as to preclude reliance by consumers.").

21 A statement is also considered puffery if the claim
22 is extremely unlikely to induce consumer reliance.
23 Newcal Indus., Inc. v. Ikon Off. Sol., 513 F.3d 1038,
24 1054 (9th Cir. 2008). Ultimately, the difference
25 between a statement of fact and mere puffery rests in
26 the specificity or generality of the claim. Cook,
27 Perkiss & Liehe, Inc., 911 F.2d at 246. "The common
28 theme that seems to run through cases considering

1 puffery in a variety of contexts is that consumer
2 reliance will be induced by specific rather than general
3 assertions.” Id. Thus, a statement that is
4 quantifiable, that makes a claim as to the “specific or
5 absolute characteristics of a product,” may be an
6 actionable statement of fact while a general, subjective
7 claim about a product is non-actionable puffery. Id.

8 Courts may determine at the motion to dismiss stage
9 whether an alleged misrepresentation is a statement of
10 fact or mere puffery as a matter of law. Newcal Indus.,
11 Inc., 513 F.3d at 1053. Since Plaintiffs assert that
12 Defendants’ statements are “false and/or misleading,”
13 the Court assesses whether the claims are literally
14 false or true but misleading. FAC ¶ 58.

15 A. Literally False

16 To be literally false, a statement must “expressly
17 or impliedly assert a fact that is susceptible to being
18 proved false,” and must be able to reasonably be
19 “interpreted as stating actual facts.” Weller v.
20 American Broad. Cos., 283 Cal. Rptr. 644, 650 (1991).
21 Claims that a defendant invented a product to fill a gap
22 in the market, and the resulting implications regarding
23 the innovativeness of a defendant’s product, constitute
24 puffery rather than an assertion of fact. See
25 Soilworks, LLC v. Midwest Indus. Supply, Inc., 575 F.
26 Supp. 2d 1118, 1133 (D. Ariz. 2008) (holding that claims
27 that a company was the “innovator” of a product and that
28 the product was the result of “revolutionary state-of-

1 the-art innovation" constituted puffery because those
2 claims are general, vague, and unmeasurable.); Williams
3 & Lake LLC v. Genesis Systems LLC, No. CV-17-00117-TUC-
4 CKJ, 2017 WL 6418937 at *6-8 (D. Ariz. Sept. 13, 2017)
5 (establishing that "inventorship is not a cause of
6 action" for false advertising under the Lanham Act, and
7 that claims attacking defendant's statements about
8 inventorship do not challenge the nature of the
9 defendant's product even if the statements create a
10 perception that the plaintiff's product is inferior).

11 Here, Defendant Roup's statements constitute non-
12 actionable puffery. First, her statement that "[she]
13 knew something was missing from the boutique fitness
14 community, so [she] combined [her] passion for dance and
15 love for fitness to create The Sculpt Society" conveys a
16 general, vague, and unmeasurable assertion regarding
17 inventorship and the innovativeness of Defendants'
18 products. See Soilworks, LLC, 575 F. Supp. 2d at 1133;
19 Williams & Lake LLC, 2017 WL 6418937 at *6-8. Next,
20 Defendant Roup's statement that she "spent years
21 teaching fitness and developing The Sculpt Society
22 method before launching in 2017" is another general and
23 vague assertion of inventorship. While Plaintiffs
24 appear to primarily take issue with Defendant Roup's
25 statement about her development of The Sculpt Society
26 method, it is worth noting that Plaintiffs offer
27 evidence proving the truth of Defendant Roup's claim
28 that she "spent years teaching fitness." FAC ¶¶ 58-59;

1 Id. ¶ 3 (“[Plaintiff] TANY employed [Defendant] Roup as
2 a trainer from 2011 to 2017.”). Moreover, it is
3 unlikely a reasonable consumer would rely on these
4 statements as an objective, measurable statement of
5 fact. See R & A Synergy LLC v. Spanx, Inc., No. 2:17-
6 CV-09147-SVW-AS, 2019 WL 4390564 at * 11 (C.D. Cal.
7 May 1, 2019) (holding that a CEO’s representations that
8 she invented a product and that it filled a “white
9 space” in the market were puffery that would not induce
10 consumer reliance).

11 B. True But Misleading

12 If an advertising claim is not literally false, a
13 plaintiff may still satisfy the first element of a
14 Lanham Act false advertising claim by establishing that
15 the representations of fact in advertising statements
16 were literally true but otherwise misled, confused, or
17 deceived the public. Southland Sod, 108 F.3d at 1140.
18 A plaintiff generally relies on consumer surveys to
19 assess whether consumers were misled. Id.

20 Plaintiffs argue that Defendant Roup’s statements
21 may mislead the public to wrongly believe that
22 (1) Defendant Roup developed the “TSS Method” over a
23 period of multiple years, when she did not; (2) the “TSS
24 Method” was created through years of science-based
25 research, development, data collection, analysis, and
26 trial and error, when it was not; and (3) the “TSS
27 Method” is significantly different from Plaintiffs’ “TA
28 Method,” when it is not. FAC ¶ 58, 59. As explained

1 above, Defendant Roup's statements are non-actionable
2 puffery, meaning that reasonable consumers are unlikely
3 to rely on these statements to make purchasing decisions
4 regardless of whether the statements may be misleading.
5 Thus, Defendant Roup's statements cannot be considered
6 true but misleading as a matter of law.

7 Therefore, Plaintiffs have not adequately pled that
8 Defendants have made a false statement of fact and the
9 Court **GRANTS** Defendants' Motion to Dismiss Plaintiff's
10 Lanham Act claim.

11 Since the Court resolves Defendants' Motion to
12 Dismiss Plaintiff's Lanham Act claim on these grounds,
13 it need not address the remaining false advertising
14 factors or parties' arguments.

15 c. Breach of Contract

16 Plaintiff TANY alleges that Defendant Roup breached
17 her employment contract with Plaintiff TANY. FAC ¶ 65.
18 To plead a cause of action for breach of contract, a
19 plaintiff must show (1) the existence of a contract;
20 (2) plaintiff's performance or excuse for
21 nonperformance; (3) defendant's breach; and (4) that
22 plaintiff sustained damages resulting from the breach.
23 See Zamora v. Solar, No. 2:16-CV-01260-ODW-KS, 2016 WL
24 3512439, at *3 (C.D. Cal. June 27, 2016) (citing CDF
25 Firefighters v. Maldonado, 70 Cal. Rptr. 3d 667, 680
26 (2008)).

27 Plaintiff TANY has sufficiently alleged a breach of
28 contract claim. Plaintiff TANY states that it entered

1 into and performed its obligations under a "Trainer
2 Agreement" with Defendant Roup. FAC ¶¶ 3, 29, 65-66.
3 The Trainer Agreement prohibited trainers, including
4 Defendant Roup, from "using or disclosing company
5 'Confidential Information,' which includes its nonpublic
6 business and operational information, training materials
7 and manuals, and the transcribed methods taught to
8 trainers, including those comprising the TA Method's
9 proprietary choreography movements, sequences, and
10 routines" during and after their employment with
11 Plaintiff TANY. Id. ¶ 3, 29.

12 Next, Plaintiff TANY contends Defendant Roup
13 breached the Trainer Agreement by "using and disclosing
14 to [third parties] the Confidential Information after
15 the termination of her employment [with Plaintiff]
16 TANY." Id. ¶ 68. Specifically, Plaintiff TANY asserts
17 that Defendant Roup (1) used the Confidential
18 Information "with developing the TSS Method and with
19 planning, recording, and publishing videos on the TSS
20 app and website"; (2) used the Confidential Information
21 "related to customers, operations, program structure,
22 customer intake methods, and employees"; and
23 (3) "disclosed the Confidential Information to third
24 parties, including employees, affiliates, and/or
25 customers of TSS." Id. Finally, Plaintiff TANY
26 contends that as a result of Defendant Roup's alleged
27 breach, Plaintiff TANY "has suffered, and will continue
28 to suffer, substantial monetary damages in an amount to

1 be determined at trial.” Id. ¶ 69. Thus, Plaintiff
2 TANY has alleged a plausible breach of contract claim.
3 The Court therefore **DENIES** Defendants’ Motion to Dismiss
4 Plaintiffs’ breach of contract claim.

5 d. Violations of California Unfair Competition
6 Law

7 Plaintiffs argue that Defendants violated
8 California’s Unfair Competition Law (“UCL” or “section
9 17200”) because they engaged in unfair and/or fraudulent
10 business acts and practices including: (1) taking,
11 using, and continuing to use Plaintiffs’ confidential
12 information to form and operate TSS, which competes with
13 Plaintiffs, and (2) making false and/or misleading
14 descriptions or representations of fact by setting forth
15 the statements addressed in Plaintiffs’ false
16 advertisement claim. FAC ¶ 71.

17 California’s UCL prohibits “any unlawful, unfair or
18 fraudulent business act or practice and unfair,
19 deceptive, untrue or misleading advertising.” Cal. Bus.
20 & Prof. Code § 17200. Each UCL prong—unlawful, unfair,
21 and fraudulent—provides a separate and distinct theory
22 of liability. Lozano v. AT&T Wireless Servs., Inc.,
23 504 F.3d 718, 731 (9th Cir. 2007).

24 Since Plaintiffs alleged Defendants participated in
25 “unfair and/or fraudulent business acts,” they are
26 required to plead their claims under the unfair and
27 fraud prongs of the UCL. See Lozano, 504 F.3d at 731.
28 ///

1 ///

2 i. "Unfair" Prong

3 The "unfair" prong of the UCL prohibits a business
4 practice that "violates established public policy
5 or . . . is immoral, unethical, oppressive or
6 unscrupulous and causes injury to consumers which
7 outweighs its benefits." McKell v. Wash. Mut., Inc.,
8 49 Cal. Rptr. 3d 227, 240 (2006). The California
9 Supreme Court has held that "[w]hen a plaintiff who
10 claims to have suffered injury from a direct
11 competitor's 'unfair' act or practice invokes
12 section 17200, the word 'unfair' in that section means
13 conduct that threatens an incipient violation of an
14 antitrust law, or violates the policy or spirit of one
15 of those laws because its effects are comparable to or
16 the same as a violation of the law, or otherwise
17 significantly threatens or harms competition." Cel-Tech
18 Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal.
19 4th 163, 187 (1999).

20 Although Plaintiffs allege that Defendants are
21 competitors, Plaintiffs do not argue that Defendants'
22 alleged misconduct threatens an incipient violation of
23 an antitrust law or has effects comparable to a
24 violation of an antitrust law. See generally FAC.
25 Accordingly, Plaintiffs have not sufficiently alleged a
26 plausible claim for relief under the UCL's unfair prong.

27 ii. "Fraud" Prong

28 "To state a claim under the 'fraud' prong of

1 [section] 17200, a plaintiff must allege facts showing
2 that members of the public are likely to be deceived by
3 the alleged fraudulent business practice.” Antman v.
4 Uber Techs., Inc., No. 3:15-cv-1175-LB, 2015 WL 6123054,
5 at *6 (N.D. Cal. Oct. 19, 2015). “Claims under the
6 fraud prong of the UCL are subject to the particularity
7 requirements of Federal Rule of Civil Procedure 9(b).”
8 In re Anthem, Inc. Data Breach Litig., No. 15-MD-2617-
9 LHK, 2016 WL 3029783, at *34 (N.D. Cal. May 27, 2016);
10 see also Kearns v. Ford Motor Co., 567 F.3d 1120, 1122,
11 1126-27 (9th Cir. 2009) (“[If] the [UCL] claim is said
12 to be ‘grounded in fraud’ . . . the pleading of that
13 claim as a whole must satisfy the particularity
14 requirement of Rule 9(b).”). A plaintiff, therefore,
15 must plead the time, place, and contents of the false
16 representations, as well as the identity of the person
17 making the misrepresentation and what that person
18 obtained thereby. See Fed. R. Civ. P. 9(b).

19 To have standing under the UCL’s fraud prong, a
20 claim must plead “actual reliance by the [party] seeking
21 relief under [the statute].” Morgan v. AT&T Wireless
22 Servs., Inc., 177 Cal. App. 4th 1235, 1235 (2009). No
23 California state court has addressed whether “competitor
24 plaintiffs must plead their own reliance or whether
25 pleading consumer reliance is sufficient for fraudulent
26 business practice claims brought by competitors.”
27 23andMe, Inc. v. Ancestry.com DNA, LLC, 356 F. Supp. 3d
28 889, 911 (N.D. Cal. 2018). As a result, there is a

1 split of authority in the California district courts
2 with a majority view that a plaintiff must allege its
3 own reliance and not the reliance of third parties.
4 Id.; see also ConsumerDirect, Inc. v. Pentius, LLC, No.
5 821CV01968JVSADSX, 2022 WL 16949657 at *8 (C.D. Cal.
6 Aug. 25, 2022) (adopting the majority approach that a
7 plaintiff must allege its own reliance). But see
8 Jerome's Furniture Warehouse v. Ashley Furniture Indus.,
9 Inc., No. 20CV1765-GPC(BGS), 2021 WL 1541649 at *7-8
10 (S.D. Cal. Apr. 20, 2021) (adopting the minority
11 approach based on some courts' perception that the
12 "broad, sweeping language" of the UCL indicates
13 California legislative intent that the substantive reach
14 of UCL claims be "expansive") (internal quotations and
15 citations omitted).

16 Plaintiffs fail to plead with specificity that they
17 actually relied upon Defendant Roup's alleged
18 misrepresentations. Therefore, Plaintiffs fail to state
19 a UCL claim under the fraud prong.

20 Since Plaintiffs have not sufficiently alleged a
21 UCL claim under either relevant prong, the Court **GRANTS**
22 Defendants' Motion to Dismiss Plaintiffs' UCL claim.

23 e. Leave to Amend

24 "Where a motion to dismiss is granted, a district
25 court must decide whether to grant leave to amend."
26 Winebarger v. Pennsylvania Higher Educ. Assistance
27 Agency, 411 F. Supp. 3d 1070, 1082 (C.D. Cal. 2019).
28 "The court should give leave [to amend] freely when

1 justice so requires." Fed. R. Civ. P. 15(a)(2). In the
2 Ninth Circuit, "Rule 15's policy of favoring amendments
3 to pleadings should be applied with 'extreme
4 liberality.'" United States v. Webb, 655 F.2d 977, 979
5 (9th Cir. 1981). Against this extremely liberal
6 standard, the Court may consider "the presence of any of
7 four factors: bad faith, undue delay, prejudice to the
8 opposing party, and/or futility." Owens v. Kaiser
9 Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir.
10 2001).

11 Here, leave to amend Plaintiffs' claims should be
12 granted because Plaintiffs can cure their Complaint by
13 pleading additional facts that support their claims.
14 There is no evidence of bad faith or undue delay by
15 Plaintiff, or potential prejudice to Defendant by
16 allowing amendment. The Court therefore **GRANTS**
17 Defendants' Motion to Dismiss Plaintiff's Lanham Act and
18 UCL claims **with leave to amend**.

19 2. Motion to Strike

20 Defendants move to strike the portion of
21 Plaintiffs' UCL claim asserting that Defendants engaged
22 in unfair and/or fraudulent business acts and practices
23 by making false or misleading statements in advertising.
24 See Mot. 23:1-24:21; White v. Lieberman, 103 Cal. App.
25 4th 210, 220 (2002) (holding that the trial court erred
26 as a matter of law when it denied the defendant's anti-
27 SLAPP motion to strike as moot because it granted the
28 defendant's demurrer on the same claim); Thornbrough v.

1 West Placer Unified Sch. Dist., 2010 WL 2179917, at *11
2 (E.D. Cal. May 27, 2010) ("Since a defendant who
3 prevails on an anti-SLAPP motion is entitled to recover
4 mandatory attorney's fees, the dismissal of Plaintiff's
5 claims against [defendant] does not moot [defendant's]
6 anti-SLAPP motion.").

7 As described, a court considering whether claims
8 are barred by the "anti-SLAPP statute must engage in a
9 two-part inquiry." Vess v. Ciba-Geigy Corp. USA,
10 317 F.3d 1097, 1110 (9th Cir. 2003). "First, a
11 defendant must make an initial prima facie showing that
12 the plaintiff's suit arises from an act in furtherance
13 of the defendant's right of petition or free speech."
14 Id. (internal quotation marks omitted). Under the anti-
15 SLAPP statute, free speech includes "'any written or
16 oral statement or writing made in a place open to the
17 public or a public forum in connection with an issue of
18 public interest,' and 'any other conduct in furtherance
19 of the exercise of the constitutional right of petition
20 or the constitutional right of free speech in connection
21 with a public issue or an issue of public interest.'"
22 Id.

23 Generally, if a defendant makes an initial prima
24 facie showing, "the burden shifts to the plaintiff to
25 demonstrate a probability of prevailing on the
26 challenged claims." Id. But "when an anti-SLAPP motion
27 to strike challenges only the legal sufficiency of a
28 claim," as here, a court considers instead "whether a

1 claim is properly stated.” Planned Parenthood Fed’n of
2 Am., Inc. v. Ctr. for Med. Progress, 890 F.3d 828, 834
3 (9th Cir.), amended, 897 F.3d 1224 (9th Cir. 2018); see
4 also Day v. California Lutheran Univ., No.
5 821CV01286JLSDFM, 2022 WL 17037433 at *12 (C.D. Cal.
6 Aug. 30, 2022) (assessing whether defendants made a
7 prima facie showing that the activities at issue in
8 their anti-SLAPP motion were protected conduct).

9 As to the first part of the anti-SLAPP inquiry, the
10 Court finds that the Defendants have sufficiently made a
11 prima facie showing that the activities at issue are
12 protected conduct. Defendants pled that the challenged
13 written statements are publicly available on a website,
14 and that they regard an issue of public interest because
15 of Defendant Roup’s public persona. Mot. 23:1-24:21.

16 The California appellate courts have developed
17 multiple tests to determine whether a defendant’s
18 activity is in connection with a public issue. Hilton
19 v. Hallmark Cards, 599 F.3d 894 906 (9th Cir. 2010).
20 Relevant here is the Rivero test, where the Court of
21 Appeal for the First District of California surveyed the
22 appellate cases and established three categories of
23 public issues: (1) statements “concern[ing] a person or
24 entity in the public eye”; (2) “conduct that could
25 directly affect a large number of people beyond the
26 direct participants”; (3) “or a topic of widespread,
27 public interest.” Rivero v. American Federation of
28 State, County, & Municipal Employees, 130 Cal. Rptr. 2d

1 81, 89-90 (2003).

2 Here, Defendants have adequately pled that
3 Defendant Roup is person or entity in the public eye by
4 stating that she is a "celebrity fitness trainer and
5 influencer" with a substantial number of customers and a
6 significant social media following. Mot. 23:21-24:5.
7 Further, Defendants contend that Defendant Roup's
8 statements are biographical, and therefore Defendants
9 have shown that the statements concern a person or
10 entity in the public eye. Id. 24:6-10.

11 As to the second part of the analysis, Defendants
12 argue that "Plaintiffs cannot carry their burden to show
13 a likelihood of prevailing on the portion of their UCL
14 claim" based on Defendant Roup's biographical
15 statements. Id. 24:12-16. And the Court has already
16 established that Plaintiffs have not pled a plausible
17 UCL claim. But "granting a defendant's anti-SLAPP
18 motion to strike a plaintiff's [] complaint without
19 granting the plaintiff leave to amend would directly
20 collide with Fed. R. Civ. P. 15(a)'s policy favoring
21 liberal amendment." Verizon Delaware, Inc. v. Covad
22 Commc'ns Co., 377 F.3d 1081, 1091 (9th Cir. 2004); see
23 also Day, 2022 WL 17037433 at *12 (granting plaintiffs'
24 leave to amend their first amended complaint despite
25 defendants' anti-SLAPP motion).

26 The purpose of the anti-SLAPP statute would still
27 be served if Plaintiffs eliminate meritless claims or
28 plead them adequately. See id. If, after amendment,

1 the Complaint still contains legally insufficient
2 claims, Defendants continue to have anti-SLAPP remedies
3 available to them. See Day, 2022 WL 17037433 at *12
4 (declining to rule on defendants' anti-SLAPP motion
5 since the court dismissed plaintiffs' claims with leave
6 to amend and defendants could reassert the motion once
7 plaintiffs filed an amended complaint). Accordingly,
8 the Court will defer its final ruling on Defendants'
9 anti-SLAPP request until after Plaintiffs have amended
10 their complaint in light of this Order.

11 **III. CONCLUSION**

12 Based on the foregoing, the Court **GRANTS**
13 Defendants' Motion to Dismiss Plaintiffs' Lanham Act and
14 UCL claims **with leave to amend** and **DENIES** Defendant's
15 Motion to Dismiss Plaintiffs' copyright and breach of
16 contract claims.

17
18 **IT IS SO ORDERED.**

19
20 DATED: December 12, 2022

/S/ RONALD S.W. LEW

21 **HONORABLE RONALD S.W. LEW**
22 Senior U.S. District Judge
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